UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

UNITED STATES OF AMERICA,	: Case No.: 3:16CR37SLO
Plaintiff,	: **OPPOSITION TO MOTION TO DISMISS THE INDICTMENT**
vs.	:
THOMAS DiMASSIMO,	:
Defendant.	:

Plaintiff United States of America, by and through its counsel of record, the United States Attorney's Office for the Southern District of Ohio, hereby files this opposition to defendant Thomas DiMassimo's motion to dismiss the indictment. This opposition is based upon the attached memorandum of points and authorities, the files and records in this case, and any further evidence or argument as may be presented at any hearing on this motion.

DATED: July 18, 2016

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

Defendant Thomas DiMassimo has moved to dismiss the information against him, claiming that: (1) the statute under which he has been charged – namely, 18 U.S.C. § 1752(a)(1) ("Section 1752")– is void-for-vagueness; and (2) he has been selectively prosecuted in violation of the equal protection guarantee of the Fifth Amendment. Mr. DiMassimo's first claim proves premature; his second allegation lacks merit.

First, in alleging that Section 1752 failed to provide him with adequate notice of the conduct that it prohibited, Mr. DiMassimo raises an as-applied (as opposed to general) challenge to this statutory provision. To determine whether this law – which, as a general proposition, puts a reasonable person on notice as to the conduct that it punishes – proves vague as to this defendant, the Court must necessarily engage in a fact-specific inquiry that is inextricably intertwined with the ultimate merits of case. Because resolution of this issue is bound up in, and would result in a pretrial determination concerning, the merits of the case, Mr. DiMassimo's void-for-vagueness challenge is premature and should be denied without prejudice to renewal upon the conclusion of the evidence at trial.

Second, Mr. DiMassimo's selective prosecution claim lacks merit. He has not made the prima facie showing necessary to obtain a hearing on this matter, failing to establish either discriminatory intent or discriminatory effect. Indeed, his brief is devoid of sufficient competent evidence to demonstrate that the United States has declined to charge similarly situated individuals. Accordingly, his selective prosecution claim should be denied absent a hearing or discovery.

II

ARGUMENT

A. Mr. DiMassimo's Due Process Challenge to Section 1752 Is Necessarily Bound Up in the Merits of the Case and Therefore Is Premature at this Time

Contending that section 1752 failed to place him on adequate notice concerning the conduct that it proscribes, Mr. DiMassimo alleges that this law fails under the void-for-vagueness doctrine embodied in the Due Process Clause of the Constitution. As detailed more fully below, given the nature of Mr. DiMassimo's challenge, he bears the burden of establishing that this law proved vague not generally, but as applied to the facts of his case. Because such a showing is necessarily intertwined with, and bound up in, the ultimate merits of the case, this portion of his motion is not ripe for pretrial disposition. As such, the United States respectfully submits that the Court should deny this portion of Mr. DiMassimo's motion without prejudice to renewal at the close of evidence at trial.

1. The Notice Requirements of the Due Process Clause

The Due Process Clause of the Fifth Amendment imposes certain minimum notice requirements upon a criminal statute that proscribes or otherwise punishes an individual's conduct. *See Maynard v, Cartwright*, 486 U.S. 356, 361 (1988). Under this void-for-vagueness doctrine, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This doctrine does not invalidate a statute merely because either it lacks a definition of every term contained within its provisions or there exists difficulty "in determining whether [the] incriminating fact . . . has been proved." *United States v. Williams*, 553 U.S. 285, 306 (2008); *United States v. Gagliardi*, 506 F.3d 140, 147 (2d Cir.2007) (rejecting void-for-vagueness challenge to a criminal statute that did not define terms 'persuade,' 'induce,' 'entice,' or 'coerce' as each had a commonly understood meaning). Rather, a statute is vague if there exists "an indeterminacy of precisely what [the incriminating] fact is." *United States v. Maslenjak*, 821 F.3d 675, 694 (6th Cir. 2016). In short, a statute is vague, not because "it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614

(1971).

In conducting this analysis, a court must weigh "every possible presumption . . . in favor of the validity of [the law]." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887). Moreover, the court should not parse the statute, engaging in an overly-legalistic analysis of its terms; rather, "dictionary definitions and old-fashioned common sense facilitate the inquiry." *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 371 (4th Cir. 2012).

When the challenge to a statute (as Mr. DiMassimo's does) rests upon a purported lack of notice, it "may be overcome in any specific case where reasonable people would know that their conduct is at risk." *Maslenjak*, 821 F.3d at 694 (*quoting Maynard*, 486 U.S. at 361). Moreover, where, as here, the defendant fails to allege that the statute implicated First Amendment rights,[1] his challenge to a statue's vagueness must be considered on an "as-applied" basis. *Maslenjak*, 821 F.3d at 695. Consequently, he "bears the burden of establishing that the statute is vague as applied to his particular case, not merely that the statute could be construed as vague in some hypothetical situation." *United States v. Krumrei*, 258 F.3d 535, 537 (6th Cir. 2001); *see also United States v. Levy*, 904 F.2d 1026, 1032 (6th Cir. 1990) (noting that when "the first amendment is not implicated, a 'void for vagueness' challenge must be

[1] Nor could he as Section 1752 has been deemed a reasonable time, place, and manner restriction consistent with the First Amendment. *See, e.g., Rudolph v. Ridge*, 2004 WL 2626150, at 9-12 (D.S.C. Feb. 17, 2004) (rejecting First Amendment challenge to 18 U.S.C. § 1752).

unconstitutional as applied to the defendant and 'must be examined in light of the facts of the case at hand.'"). Thus, if evidence exists that the defendant knew that his conduct was prohibited, he cannot validly claim that the statute was vague. *See id.* (rejecting vagueness challenge to trade secret statute when defendant evinced wrongfulness of his conduct). Because such an inquiry may necessarily intersect with the merits of a case, a court has discretion to defer ruling on such a claim until conclusion of the government's case-in-chief. *See* Fed. R. Proc. 12(b)(1)-(3) (indicating that motions may be decided pretrial so long as the court may resolve it "without a trial on the merits"); *United States v. Marra*, 481 F.2d 1196, 1199-1200 (6th Cir. 1973) ("A motion to dismiss the indictment cannot be used as a device for summary trial of the evidence"); *United States v. Shalash*, 2005 WL 1892331, at *2 (S.D. Oh. Aug. 9, 2005) (Spiegel, J.) (same); *cf. United States v. Collake*, 134 F.3d 372, 1998 WL 25007, at *4 (6th Cir. 1998) (appropriate to raise motion to dismiss based on statute of limitations issue either at trial or at the conclusion of the evidence at trial where it involved a factual determination wrapped in the merits of the case).

2. By Its Plain Terms, Section 1752 Establishes Sufficiently Clear Standards Concerning the Conduct That It Prohibits

Here, the United States has charged Mr. DiMassimo with a violation of Title 18, United States Code, Section 1752(a)(1), which prescribes punishment for "whoever knowingly enters or remains in any restricted building or grounds without lawful authority to do so." 18 U.S.C. § 1752(a)(1). By its plain terms, the statute defines the prohibited conduct – namely, "without lawful authority", "knowingly entering . . . any restricted building or grounds" – narrowly to include "any posted, cordoned off, or otherwise restricted area" of a location where a "person protected by the Secret Service is or will be visiting." 18 U.S.C. § 1752(c)(1)(C). Although Mr. DiMassimo effectively complains that these phrases are vague, they place a person of reasonable intelligence on notice concerning the conduct that the statute proscribes – knowingly without permission (as opposed to accidently or with authority) entering an area around a Secret Service protectee that law enforcement has sealed off for the protectee's safety.

While determining whether an individual has violated this law may require a case-by-case analysis, it creates no doubt about the facts that give rise to criminal culpability. *See Maslenjak*, 821 F.3d at 694 (statute is not vague merely because fact establishing guilt will require a case-by-case analysis). Indeed, statutes similar to 18 U.S.C. § 1752, which amounts to a Federal trespass statute, repeatedly have withstood void-for-vagueness challenges – even where a defendant did not have express written notice that there conduct may constitute a potential violation of the statute. *See, e.g.*, *Adderly v. Florida*, 385 U.S. 39, 43 (1966) (rejecting challenge to state trespass statute on void-for-vagueness grounds); *Bollier v. People*, 635 P.2d 543, 545-46 (Col. 1981) (same); State *v. Coleman*, 528 So. 2d 192, 194-95 (La. App. Ct. 1988) (same); *State v. Brooks*, 741 S.W.2d 920, 923-24 (Tenn. 1987) (rejecting void-for-vagueness challenge to carrying a firearm at school where defendant convicted of statute even though school failed to post notice on its grounds that such conduct constituted a criminal violation); *Leiss v. United States*, 364 A.2d 803, 805-06 (D.C. Sup. 1976) (rejecting challenge to District of Columbia trespass statute where protestor refused to leave White House grounds after having initially gained lawful entry to this location).

Nor do the terms "cordoned off", "restricted area", and "posted", have such uncommon or amorphous meanings that they are unintelligible to the average person or enable arbitrary and discriminatory enforcement of this law. Based on common understandings and usage, each of these phrases denote a closed off area to which access is limited or controlled by, for instance, physical markings and boundaries or displayed warnings. *See, e.g.*, *United States v. Bursey*, 416 F.3d 301, 307 (4th Cir. 2005) (indicating that the term *"cordoned off"* as used in 18 U.S.C. § 1752 commonly means "a barrier of any kind operating to close off, restrict, or control access"); WEBSTER'S DICTIONARY 918 (1994) (defining "post" as "to put up (an announcement) in a place of public view . . .; to put up signs on (property) warning against trespassing"); MERRIAM-WEBSTER DICTIONARY, *available at* http://www.merriam-webster.com (accessed July 17, 2016) (defining a "restricted area" as an "off limits area").

Each phrase carries with it sufficient precision not only to notify an individual concerning the conduct that the law prohibits but also to prevent government officials from using mere whim to decide who has violated the statute's terms.

Mr. DiMassimo's general (and wholly cursory) challenge to the statute's use of the phrase "without lawful authority" "to enter" fairs no better. Federal regulations expressly define the individuals who may permissibly enter "to or from any posted, cordoned off, or otherwise restricted areas of a building or grounds where . . . other person protected by the United States Secret Service is or will be visiting." 31 C.F.R. § 408.3(a). Such "authorized" "persons" include only:

> (1) Invitees [i.e.,] [p]ersons invited by or having appointments with the protectee, the protectee's family, or members of the protectee's staff; (2) Members of the protectee's family and staff; (3) Military and Communications Personnel;(4) Federal, state, and local law enforcement personnel engaged in the performance of their official duties and other persons, whose presence is necessary to provide services or protection for the premises or persons therein; (5) Holders of grants of easement to the property [who may enter only on certain conditions]

31 C.F.R. § 408.3(a)(1)-(5). Far from encouraging arbitrary enforcement or creating confusion for the reasonable person concerning who may enter a restricted area, these regulations provide strict and definitive guidance concerning who may permissibly "ingress or egress" from a protection zone.[2] As a general matter,

[2] Notably, in attempting to paint the statute as unconstitutionally vague (and thereby subject to arbitrary enforcement), Mr. DiMassimo emphasizes that

section 1752 and its implementing regulations comport with Due Process.

3. Mr. DiMassimo's As-Applied Challenge to the Statute Is Premature as It Is Inextricably Intertwined with the Merits of the Case.

Given the nature of his Due Process claim, however, Mr. DiMassimo's challenge involves a more limited inquiry: namely, whether he has carried his burden and established that, when these general, defined terms are applied to the specific facts of his case, the statute proves void-for-vagueness. *See Krumrei*, 258 F.3d at 537. As noted above, such a claim fails *ab initio* "in any specific case where reasonable people would know that their conduct is at risk." *Maslenjak*, 821 F.3d at 694. Additionally, if there is evidence that Mr. DiMassimo knew that his conduct was prohibited, he cannot validly claim that the statute was vague as to him. *Krumrei*, 258 F.3d at 537.

Resolution of these matters necessarily is inextricably intertwined with, and bound up in, the ultimate merits of this case; as such, the court should decline to resolve Mr. DiMassimo's motion at this time. *See* Fed. R. Proc. 12(b)(1)-(3) (indicating that motions may be decided pretrial so long as the court may resolve it

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individuals who have been *invited* into the cordoned off area and onto the stage by a protectee have not been prosecuted for violations of 18 U.S.C. § 1752. Rather than demonstrating the arbitrary enforcement of this statute, Mr. DiMassimo's allegation reinforces the clarity of this law. The law prohibits only entry into a cordoned off area by those "without lawful authority to do so." By the plain terms of a statute's implementing regulation, a person who the protectee personally invites within the secured area constitutes an "invitee" and therefore has lawful authority to enter the cordoned off zone. *See* 31 C.F.R. § 408.3(a)(1) (defining an authorize person to include an "invitee").

"without a trial on the merits"); *United States v. Marra*, 481 F.2d 1196, 1199-1200 (6th Cir. 1973) ("A motion to dismiss the indictment cannot be used as a device for summary trial of the evidence"); *United States v. Shalash*, 2005 WL 1892331, at *2 (S.D. Oh. Aug. 9, 2005) (Spiegel, J.) (same); *cf. United States v. Collake*, 134 F.3d 372, 1998 WL 25007, at *4 (6th Cir. 1998) (appropriate to raise motion to dismiss based on statute of limitations issue either at trial or at the conclusion of the evidence at trial where it involved a factual determination wrapped in the merits of the case). Mr. DiMassimo claims that, absent written or verbal clarification, he failed to understand that what he styles a "ticket" to the rally did not also provide him access to the cordoned off and heavily guarded speakers platform.[3] This claim coincides with the factual issues at trial – namely, whether: (1) a cordoned off area existed; and (2) this defendant's knowledge of, and intentional (as opposed to accidental)

[3] The United States respectfully submits that a reasonable person would have been aware that crossing a defined security line and attempting to take the stage with a presidential candidate would result in his arrest. Mr. DiMassimo's argument is akin to professing ignorance that a general admission ticket to a Bruce Springsteen concert does not also provide the attendee with right to storm the stage and to demand to play with the E Street Band. Or that box seats to the Reds game also do not come with ability to stand on the pitcher's mound next to the closer during the ninth inning. Although most individuals would fail to identify a specific law that such conduct would violate, they nevertheless would know that jumping the stage or storming the field – even absent specific admonishes not to do so – would subject them to criminal prosecution. Similarly, in this modern era, without specific knowledge of section 1752 and its implementing regulations, a reasonable person would understand that the immediate area around a presidential candidate – particularly, one marked off by barriers and security personnel – is off limits to the general public for security reasons even absent written or verbal warnings from the Secret Service. *See, e.g.*, *Bursey*, 416 F.3d at 309 (rejecting claim that, to violate section 1752, defendant had to be aware of its precise terms); *United States v. Vasarajs*, 908 F.2d 443, 449 (9th Cir. 1990) (noting that while "due process requires that there have been some way for [the defendant] to learn the boundary of the Fort," "this probably does not mean that the government had to provide actual notice [of those boundaries]").

entry into it.

As the United States intends to establish at that trial, this defendant had ample knowledge – both generally and specifically – concerning the impropriety of his conduct. Prior to his attendance at the rally, Mr. DiMassimo posted statements on social media indicating a tacit understanding that efforts to rush the speaker's platform would result in his arrest. Once at the rally, after passing through a metal detector, Mr. DiMassimo made his way up to a barrier that created a buffer between the attendees of the event and the speaker's stage. Standing approximately four feet high, this barrier enclosed the speaker's stage and lacked any general openings to the public that permitted the audience to enter this area. Upon the candidate's arrival, the inside of the barrier was lined with law enforcement and was devoid of the rally's general attendees. To enter this area, Mr. DiMassimo did not stroll through a gate or an opening in the cordon. Rather, as videotaped evidence makes evident, he hurdled the barrier and then ran towards the speaker's platform – conduct that, put mildly, suggests that he knew that he had entered a restricted area. His unsolicited statements following his arrest further confirmed his knowledge concerning the wrongfulness of his conduct; he advised officers, among other things, that: (1) he saw Secret Service agents within the fenced area; (2) despite that fact, he believed he could jump the fence without being caught; and (3) prior to the rally, he had left his car keys with his girlfriend so that she could take his vehicle home. Whether considered separately or together, these facts that will be presented at trial defeat his notice claim; if proven at trial, this evidence unequivocally establishes not only that this defendant knew the wrongfulness of his actions but also that he violated section 1752.

In sum, Mr. DiMassimo's Due Process claim premised on a purported lack of notice necessarily will overlap with, and entail a full trial on, the merits of this case. Rather than hold a lengthy pretrial hearing which will merely replicate a subsequent trial, the United States respectfully requests that the Court deny this portion of the defendant's motion without prejudice to renewal at the conclusion of the evidence at trial.

B. Mr. DiMassimo Has Failed To Articulate a Viable Claim for Selective Prosecution.

Second, contrary to his claims, Mr. DiMassimo has failed to establish that his prosecution occurred in violation of the Equal Protection Guarantee of the Fifth Amendment. In particular, Mr. DiMassimo contends that the United States singled him out for prosecution under Section 1752 based upon some unspecified political affiliation. His claim lacks merit.

"The Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). "As a result, the presumption of regularity supports their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Id.* At the same time, though, prosecutors must comport their charging decisions with the principles of the Constitution; consistent with the mandates of the Due Process Clause of the Fifth Amendment, "the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.*; *see also United States v. Hendrickson*, 664 F. Supp. 2d 793, 798 (E.D. Mich. 2009) (addressing selective prosecution claims predicated upon the First Amendment).

To prevail on such a selective prosecution claim, a defendant "must show that the federal prosecutorial policy had both a discriminatory effect and a discriminatory intent." *United States v. Jones*, 399 F.3d 640, 645 (6th Cir. 2005) (emphasis added). To establish discriminatory intent, the defendant must show that "the prosecutorial policy was motivated by [] animus, [*i.e.*, an intent to curtail the protected activity]." *Jones*, 399 F.3d at 645; *Hendrickson*, 664 F. Supp. 2d at 802. To establish discriminatory effect, the defendant must make a "credible showing that similarly situated individuals outside the protected class – [here, apparently individuals of different political ideologies] – have avoided prosecution despite engaging in the same or similar conduct." *Hendrickson*, 664 F. Supp. 2d at 799; *see also Jones*, 399 F.3d at 645. Conclusory claims of counsel or citations to press accounts prove insufficient to prevail on this claim; indeed, absent some evidence tending to show the existence of the essential elements of the defense, a defendant is entitled to neither discovery nor a hearing on the claim. *See Hendrickson*, 664 F. Supp. 2d at 798.

Here, Mr. DiMassimo has failed to make even a prima facie showing of selective prosecution. While generically claiming that his prosecution was motivated by his purported political affiliations, he failed to articulate even what those affiliations are. Absent even this most basic showing, he has failed to articulate any cognizable grounds upon which the purported discriminatory intent could have been formed. As equally problematic, Mr. DiMassimo has presented no evidence – let alone competent evidence – demonstrating any discriminatory effect. His equal protection argument, in fact, makes no effort to identify even a single similarly situated individual whom the United States declined to prosecute.

Even if those portions of his brief addressing his notice argument are incorporated by reference into his equal protection claim, they too prove insufficient. First, press accounts of individuals whom a candidate has invited onto the stage with him, standing alone, fail to pierce the presumption of regularity that attach to prosecutions. *See Hendrickson*, 664 F. Supp. 2d at 798. Second, the individuals identified in these press accounts are not even similarly situated to this defendant. Mr. DiMassimo notes that, at an earlier rally organized by Mr. Trump, the candidate invited two individuals onto the stage with him and that the United

States has not prosecuted this duo under Section 1752. By the defendant's own description of the event, these individuals did not violate the terms of Section 1752; as invitees of the protectee, they fall outside of the scope of criminal conduct defined in this provision. *See* 18 U.S.C. § 1752(a)(1) (prohibiting entry without lawful authority; 31 C.F.R. § 408.3(a) (defining those with lawful authority to enter to include invitees of the protectee). For these reasons, Mr. DiMassimo's selective prosecution claim is without merit.

III

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny the defendant's motion.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on defendant's counsel this 18th day of July 2016 via the Court's ECF System.

s/Brent G. Tabacchi
BRENT G. TABACCHI
Assistant United States Attorney